IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 937

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York corporation,

Petitioner,

v.

STANLEY A. MARSHALL, Administrator of the Estate of Jacob M. Marshall, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Equitable Life Assurance Society of the United States, a New York corporation, respectfully represents:

This case involves an interesting, though somewhat complex, question of the law with respect to disability benefits in life insurance policies.

The life of respondent's intestate, Jacob M. Marshall, was insured by petitioner's policy, which provided certain disability benefits. Marshall attained sixty years of age July 25, 1935. The anniversary date of the policy nearest his sixtieth birthday was December 30, 1935 (R. 24).

On December 24, 1935, Marshall's right wrist and two ribs were fractured in an automobile accident. His injuries are technically described as commutated fracture of right radius at distal end and fracture of the third and fourth ribs posteriorly (R. 25). He was unable after the accident to engage in any occupation (R. 25). He died on August 9, 1938, of angina pectoris of twenty-four hours' duration (R. 26).

The suit involves the question of what disability benefits, if any, Marshall was entitled to. The pertinent provisions of the policy follow:

TOTAL AND PERMANENT DISABILITY

(I) "DISABILITY BENEFITS before age 60 shall be effective upon receipt of due proof, before default in the payment of premium, that the Insured became totally and permanently disabled by bodily injury or disease after this policy became effective and before its anniversary upon which the Insured's age at nearest birthday is 60 years, in which event the Society will grant the following benefits:

(a) "WAIVE PAYMENT OF ALL PREMIUMS payable upon this policy falling due after the receipt of such proof and during the continuance of such total and permanent Disability; and

(b) "PAY TO THE INSURED A MONTHLY DISABILITY ANNUITY as stated on the face hereof; the first payment to be payable upon receipt of due proof of such Disability and subsequent payments monthly thereafter dur-

ing the continuance of such total and permanent Disability; provided that if this policy is continued under the Endowment conversion option, the Disability-Annuity payments shall continue only during such total and permanent disability until the maturity of the Endowment. (Note:—Any premiums so waived and any Disability-Annuity so paid shall not be deducted from any amount payable in any settlement of this policy.)

"Disability shall be deemed to be total when it is of such an extent that the Insured is prevented thereby from engaging in any occupation or performing any work for compensation of financial value, and such TOTAL DISABILITY shall be presumed to be PERMANENT when it is present and has existed continuously for not less than three months; and further, the entire and irrecoverable loss of sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire hand and one entire foot, will of themselves be considered as TOTAL AND PERMANENT DISABILITY within the meaning of this provision.

(II) Disability Benefit After Age 60.

"In case the Insured after attaining age sixty, and while this policy is in full force and effect, becomes totally and permanently disabled as above described, and furnishes due proof thereof, the Society, subject to the conditions above stated, will on each subsequent anniversary date of this policy during the continuance of such disability waive payment of the premium, if any, for the ensuing policy year, whereupon the amount of insurance shall become reduced by the amount of premiums so waived and subsequent premiums and loan and surrender values shall be reduced proportionately.

(III) Recovery From Disability.

"The Society shall have the right at any time or times during the first two years after receipt

of such proof of disability, but thereafter not more frequently than once a year, to require proof of the continuance of such total disability. If the Insured shall fail to furnish satisfactory proof thereof, or if it appears at any time that the Insured has become able to engage in any occupation or perform any work for compensation of financial value, no further premiums will be waived and no further Disability-Annuity payments will be made hereunder on account of such disability" (R. 41-43).

It is to be noted that the accident happened five months after Marshall's sixtieth birthday and six days before the anniversary of the policy nearest his sixtieth birthday (R. 24).

Marshall in his lifetime claimed disability benefits. On April 16, 1937, he surrendered his policy to petitioner's Detroit office, receiving a receipt reading as follows:

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES

New York City
Agency at Detroit, Mich., Apr. 16, 1937

"Received from Jacob Marshall

Policy No. 3,022,849, to be forwarded to the Home Office of the Society for endorsement of over age 60 benefits. This receipt does not in any way commit The Equitable Life Assurance Society of the United States to any action in connection with the said Policy.

H. G. Trochlell, Cashier,
By A. Urban."

(R. 25)

The policy was subsequently endorsed at the New York office of petitioner as follows:

"This policy has been approved for waiver of premiums as per endorsement hereon. Each premium waived reduces the insurance hereunder.

"Subject to its terms and limitations for total and permanent disability, the policy has been approved, during the continuance of the Insured's total and permanent disability, for the waiver of premiums, payable on or after December 30, 1936, whereupon the amount of insurance shall become reduced by the amount of premiums so waived, and subsequent premiums and loan and surrender values shall be reduced proportionately. (Dated at New York, May 7, 1937)." (R. 24.)

Subsequently, and in accordance with the above-set-forth endorsement on the policy, petitioner tendered to Marshall the sum of $855.90, being the premium due December 30, 1936, which had been paid by Marshall and which would be refundable to him if he were entitled to over-age-sixty disability benefits (R. 26). Marshall refused to accept this, claiming to be entitled to benefits on an under-age-sixty basis (R. 26).

In November, 1937, Marshall commenced suit in the Circuit Court for the County of Wayne, State of Michigan (R. 1-4). The cause was removed by petitioner to the United States District Court for the Eastern District of Michigan, Southern Division (R. 5-12).

Marshall's death having been suggested, Stanley A. Marshall, as Administrator of the Estate of Jacob M. Marshall, was substituted as plaintiff and is respondent herein (R. 21).

A jury having been waived (R. 22), the cause was tried in the District Court upon a stipulation of facts (R. 22-26).

The District Court found that the sole question involved was whether respondent was entitled to recover disability benefits on an under-age-sixty or an over-age-sixty basis (R. 28).

The District Court further found that in order to recover, whether on an under-age-sixty or an over-age-sixty basis, Marshall must have been totally and permanently disabled; that both elements must coexist; and from the nature of his injuries it could not be said that the injuries themselves were necessarily permanent. Under the terms of the policy injuries of the nature sustained by Marshall, in order to be permanent, must have been sustained and have existed continuously for not less than three months prior to the date of furnishing due proof of total and permanent disability. Obviously, therefore, due proof of total and presumably permanent disability could not have been furnished until March 24, 1936, which was nearly three months after the anniversary date of the policy nearest Marshall's sixtieth birthday (R. 28-29).

The District Court found no ambiguity in the policy involved, and judgment was ordered entered in favor of respondent for the sum of $850.90, less costs to be taxed in favor of petitioner, as this amount had been tendered to, and refused by, Marshall in his lifetime (R. 29).

The opinion of the District Court is found on pages 27 to 29 of the Record; the judgment on page 30.

Upon appeal by respondent to the United States Circuit Court of Appeals for the Sixth Circuit, that Court reversed the District Court and ordered judgment entered for respondent in the sum of $5,805.90, together with interest from July 29, 1939, the date of entry of judgment in the Court below (R. 49).

The amount of the judgment allowed by the Circuit Court of Appeals grants recovery on an under-age-sixty basis and computes the amount commencing from the date of the accident (R. 50). It was held by the Court of Appeals that the three-month clause, being for the benefit of the Insured, did not preclude the Insured from showing that his total and permanent disability was concomitant

with the accident; but the Court of Appeals fails to point out where in the record is found proof of permanent disability submitted by Marshall to petitioner other than the contractual presumption arising from the three-month period (R. 51), and the record is bare of such proof.

The Court of Appeals thought the policy ambiguous (R. 51), but neglected to state in what sentence, clause or paragraph the ambiguity is found. The opinion of the Court of Appeals (R. 50-53) is reported in 116 Fed. (2d) 901.

Judgment was entered January 10, 1941 (R. 49).

Thereafter petitioner filed a petition for rehearing (R. 55-58), which was denied February 14, 1941 (R. 71).

THIS PETITION PRESENTS FOUR QUESTIONS:

1. From the terms of the policy and from the nature of Marshall's injuries, is respondent entitled to recovery on an under-age-sixty basis?

2. With the record completely bare of any showing that Marshall submitted proof of permanency to petitioner, is it to be presumed that his total and permanent disability was actually concomitant with the accident?

3. Does not the policy, with certain well-defined exceptions not here involved, define permanency as—

> "Total disability shall be presumed to be permanent when it is present and has existed continuously for not less than three months."

4. When the policy provides:

> "Disability benefits before age 60 shall be effective *upon receipt of due proof* * * *,"

and further provides:

> "In case the insured, after attaining age 60, and while this policy is in full force and effect, becomes totally and permanently disabled as above described, *and furnishes due proof thereof* * * *,"

is not the furnishing of due proof of total and permanent disability by insured a condition precedent to any liability of petitioner?

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938.

Petitioner is advised and believes that the judgement of the Circuit Court of Appeals is erroneous and contrary to the just rights of petitioner, and that this Court should require said cause to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such case made and provided.

CERTIORARI SHOULD BE GRANTED for the following reasons:

I.

The decision of the Court of Appeals in granting recovery from the date of the accident, regardless of the furnishing of proof, is contrary to the decision of this Court in *Bergholm v. Peoria Life Insurance Co.*, 284 U. S. 489.

II.

The decision of the Court of Appeals is in conflict with the decision of the Supreme Court of Michigan in *Wetherall v. Equitable Life Assurance Society*, 273 Mich. 580 (Cf. *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, and *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202).

III.

The decision of the Court of Appeals is in conflict with the decision of the United States Circuit Court of Appeals (8th Circuit) in *Orr v. Mutual Life Insurance Company*, 64 Fed. (2d) 561.

IV.

The decision of the Court of Appeals is in conflict with the great weight of authority, and in conflict with settled principles of law.

V.

A large number of life insurance policies contain total and permanent disability provisions identical or similar to those here involved, thus creating a matter of public interest which should be settled by this Court.

WHEREFORE PETITIONER RESPECTFULLY PRAYS that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, to the end that said cause may be reviewed and determined by this Court as provided by law, and that petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that the judgment of said Circuit Court of Appeals may be reversed by this Honorable Court.

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES.
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